

Justice for Free Expression in 2014

A Review of the Global Freedom of Expression Jurisprudence In 2014

Strides of Hope in Uganda

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This paper discusses the legal and socio-political realities of Freedom of Expression and Access to Information in Uganda. It explores the following questions; the enabling environment for enjoyment of freedom of expression in Uganda, the most important Court developments in 2014, the key issues addressed by Courts, decisions with the greatest influence, references to international or regional standards and cases to watch out for in 2015.

1.0 Introduction

Freedom of expression, in particular media freedom and access to information are constitutionally guaranteed rights in Uganda and the country has ratified international and regional instruments, endorsing their enjoyment¹. Despite the existence of a fairly enabling legal framework, the enjoyment of freedom of expression remains a delusional aspiration to its seekers.

Freedom of expression in Uganda continues to shrink as government through its agencies resort to illegitimate restrictions on critical voices on a number of governance issues. In particular, individual journalists face arbitrary arrest, intimidation, threats and politically-motivated criminal charges for expressing views deemed by public authorities to be too critical or divergent.

Whereas the Courts of Law are making an effort to facilitate the enforcement of freedom of expression, there are several other draw-backs and limitations which restrict this, including; shortage of judges, strenuous and snail-paced litigation processes, absence of a pool of lawyers knowledgeable and willing to pursue human rights and public interest cases pro bono.

On average, obtaining a judgment from Court would take between one to five years. A case in point is *Andrew Mwenda and anor Vs AG*² where it took the Constitutional Court five years to declare sedition unlawful. Such delays contribute to the failure of Courts to enforce rights and to

¹ See <http://www1.umn.edu/humanrts/research/ratification-uganda.html>

² Consolidated Constitutional Petitions No. 12 of 2005 and No.3 of 2006

create new jurisprudence. However, there is an emerging progressive trend, as seen in 2014, where the Constitutional court within a period of three months, heard and declared null and void the Ant-Homosexuality Act of 2013. It has been argued though, that this speedy hearing was due to western donor pressure.

In spite of these challenges and constraints, Ugandan courts and lawyers are registering improvement in litigating human rights matters and in particular freedom of expression as outlined below:

2.0 The most important Court developments in 2014

2.1 Use of criminal defamation

***Uganda vs. Ssemuusi Ronald*³**

The accused Radio correspondent (now deceased) was charged with criminal defamation in 2012, under sections 179 and 180 of the Penal Code Act, Cap 120⁴, convicted and sentenced to one year in prison or to a fine of One Million Uganda Shillings (Approximately \$380) for reporting a story of public concern which alleged that the former Kalangala district Chairperson was involved in the theft of solar panels meant to pump clean water for the residents of the remote island district.

In his ruling delivered on 3rd October 2014, the trial Magistrate, Mr. Kenneth Gimugu said that the journalist caused this story to be broadcast by the Radio station, and therefore he and not the editor was liable. He further said that even a mere allegation that the former district Chairperson is being investigated for the theft of solar panels is capable of damaging his reputation. He ruled that defamatory statements stifle freedom of expression.

This decision has had a chilling effect on media freedom and the right to freedom of expression, threatening democracy, accountability and the rule of law. Journalists, most especially those operating in rural places are very apprehensive of criticizing public officials and holding them to account for public resources. Much as freedom of expression is not an absolute right, criminal defamation provisions are an excessive limitation to its enjoyment.

2.2 Unmasking the perpetual ‘national security’ rhetoric in light of open justice

***Uganda Court Reporters Association LTD V Attorney General of Uganda*⁵**

³ , MSK-01.CR.CO-028 of 2012

⁴ Any person who, by print, writing, painting, effigy or by any mean otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed libel.

⁵ Miscellaneous Cause No 87 of 2014 <http://twitdoc.com/upload/hrnjuganda/open-justice-judgement.pdf>

The decision in this case overturned a position set by a Magistrates Court in Kampala barring journalists and the general public (for reasons of national security) from attending a trial in which a police officer was accused by the Inspector General of Police of leaking security sensitive audio recordings regarding the fallout between the President of the Republic of Uganda and his Prime Minister who has since been sacked.

“An order is accordingly made that journalists or any person with recording equipment vacate court, and continue to do so for this particular case...” held Lilian Bucyana, the Trial Magistrate.

In overturning this decision, the High Court Judge ruled that the Trial Magistrate acted unreasonably, unfairly, irrationally and committed an illegality. The Court further ruled that the limitation imposed on the media fraternity by the Magistrate was not objectively verified, neither justified nor necessary. Lady Justice Lydia Mugambe thus ordered for a public retrial with journalists present in Court. Following this Judgment in September 2014, the State dropped charges against the police officer and withdrew the case. This implied that the State often hides behind the pretext of ‘national security’ to deny citizens of their rights.

2.3 Confronting the ‘limitation of rights’ debate

***Nabagesera & 3 others V Attorney General and Another*⁶**

Briefly, the applicants challenged the actions of the Minister of Ethics and Integrity, Rev. Fr. Simon Lokodo for closing a workshop organized by a group of LGBTI on the 14th of February 2012.

In July 2014, the learned High Court Judge, the Hon. Justice Stephan Musota held that “...the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable and acceptable in a free and democratic society. Whereas the applicants were exercising their rights of expression, association and assembly, in so doing, they were promoting prohibited acts which amounted to actions prejudicial to public interest. Promotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions...”

The Judge justified his decision by quoting the African Charter on Human and Peoples Rights, citing that individuals have the right to disseminate and express opinions within the law. Therefore protection of unpleasant or controversial, false or wrong speech does not extend to protecting the expression that promotes illegal acts which in itself are prohibited, like homosexuality.

⁶ *Miscellaneous Cause No. 033 of 2012, High Court Civil Division* <http://www.ulii.org/ug/judgment/high-court/2014/85>

The Judge interpreted the UN Declaration on protection of Human Rights by saying that people can be restricted in their activities in accordance with the law. Domestic law is the framework within which human rights are enjoyed and in which human rights enjoyment activities should be conducted (Article 3).

2.4 Procedural technicalities

Professor J. Oloka Onyango & 9 others vs. Attorney General of the Republic of Uganda⁷

This petition sought among others to challenge and decriminalize provisions of the Anti-Homosexuality Act of 2014 which criminalized free discussion, public debate and sharing of information pertaining to homosexuality.

The provisions prohibiting the ‘promotion of homosexuality’ most certainly criminalized the activities of the media fraternity when publishing and broadcasting issues concerning homosexuality for legitimate public debate.

The learned Justices of the Constitutional Court unanimously nullified the law on grounds that it was passed without quorum as stipulated by law, without considering the merits of the case which included major rights violations like freedom of expression. The Court missed an opportunity of creating substantive jurisprudence. The decision in essence means that Parliament may pass the same law again, if only it adheres to procedure.

3.0 Key issues addressed by the Courts

- Criminal defamation and journalists’ liability
- Right to access and disseminate information
- National Security
- Open justice and fair trial
- Morality and freedom of expression

4.0 Decisions with the greatest influence

Despite the fact that some of the 2014 decisions were positive in nature, it is arguable whether or not they have progressively influenced freedom of expression. The nullification of the Anti-Homosexuality Act merely restored the status quo which was re-emphasized in the case of *Nabagesera & 3 others V Attorney General and Another*. The penal provisions punishing ‘unnatural sexual offences are still alive and in force. The ruling pertaining to criminal defamation continues to cause a chilling effect among journalists who report issues of public interest. This has led to self-censorship and prior restraint on issues regarding public officials. However, in a

⁷ Constitutional Petition No. 8 of 2013 <http://www.ulii.org/ug/judgment/constitutional-court/2014/14>

positive way, the conviction in the case of *Uganda V Ronald Ssemuusi* inspired the filing of a Reference challenging criminal defamation in the East African Court of Justice, in Arusha.

In my opinion, the most influential decision on freedom of expression in 2014 was the *Uganda Court Reporters Association LTD V Attorney General* which re-emphasized the principles of open justice and fair trial, the right to seek, receive and impart information, which are often abused by inferior courts. The judgment set a precedent and benchmarked the procedure of limiting these rights and freedoms.

5.0 References to International or Regional Jurisdiction

The Courts in Uganda have largely relied on international and regional jurisprudence to influence their decisions. However, there is a disparity in interpretation of these standards and protocols by some Judges to suit their personal understanding, and the local context mostly the legal framework, like in the case of *Nabagesera & 3 others V Attorney General and Another*. Lady Justice Lydia Mugambe also quoted comparative jurisprudence on open justice in her *Uganda Court Reporters Association LTD V Attorney General* decision.

6.0 Forecast of Freedom of Expression Cases in 2015.

Several cases and petitions have been filed in the High Court, the Constitutional Court and the East African Court of Justice in Arusha challenging laws and practices that impede on freedom of expression and access to information, causing unjustifiable limitations to these rights. Most notably;

a) *Centre for Public Interest Law, Human Rights Network for Journalists-Uganda & East Africa Media Institute V Attorney General of Uganda*⁸

This matter was filed in March of 2014 in the Constitutional Court, the scheduling conference was conducted in February 2015 and the hearing will be on notice in April 2015.

The Petitioners seek an interpretation of the Constitution and aver that certain provisions of the Press and Journalist Act Cap 105 are inconsistent with and are in contravention of constitutional guarantees and international standards on freedom of expression.

The Press and Journalist Act majorly criminalizes the practice of journalism without a practicing certificate issued by a statutory body under the control of the Minister of Information and also conscripts journalists into one association, setting an onerous process of enrolling as a journalist before receiving a practicing certificate.

⁸ Constitutional Petition No.009 of 2014

b) *Ronald Ssemuusi V Attorney General of Uganda*⁹

Having been convicted and sentenced by a Magistrates Court of criminal defamation for reporting a story of public interest, the Applicant filed a Reference against the Attorney General of Uganda, contending that his conviction, sentence and the practice and use of criminal defamation laws are in violation of the fundamental and operating principles and the general undertaking as to implementation of the East African Community as provided under Articles 6(d), 7(2) and 8(1) (a) & (c) of the Treaty for the Establishment of the East African Community and the African Charter on Human and Peoples' Rights, as follows.

The Reference, which was filed in December 2014, seeks to decriminalize free speech.

c) *Human Rights Network Uganda & 4 Others V Attorney General*¹⁰

The Public Order Management Act of 2013 controversially re-introduced provisions of the Police Act which were declared unconstitutional by the Constitutional Court¹¹. The law gives wide discretionary powers to the police and government officials to prohibit, manage or disperse public assemblies, thereby restricting the rights to assembly, freedom of expressions and peaceful demonstration as enshrined in the Constitution and International standards.

d) *Centre for Domestic Violence Prevention & 8 Others V Attorney General*¹²

The passing into law of the Anti-Pornography Act 2014 (commonly known as the mini-skirt law) saw over twenty country wide incidences of violent attacks including undressing of women and girls whom the public deemed to be indecently dressed. The comprehension of the law by Ugandan media was a clear indication of a gross misinterpretation of some of the provisions therein, which in turn negatively impacted on the society. Ironically, the law is more restrictive to media houses and journalists.

The petitioners challenged among others the criminalization of production, publication, broadcast, procurement, importation and exportation, sale or abetment of prohibited acts of pornography whose definition is overly broad, vague and subjective and is likely to criminalize legitimate debate, commercial activities and private pursuits, and is inconsistent with and in contravention of the principle of legality, the right to privacy, freedom of expression, the press and other media, freedom of thought and conscience,

⁹ Reference No. 16 of 2014

¹⁰ Constitutional Petition No. 56 of 2013

¹¹ Muwanga Kivumbi V Attorney General, Constitutional Petition No. 9 of 2005

¹² Constitutional Petition No. 13 of 2014 <http://www.sihanet.org/sites/default/files/Petition%20Anti%20Porn.pdf>

academic freedom, freedom of assembly and association, and the right to practice one's profession and to carry on a lawful occupation, trade or business guaranteed under Articles 2(1) & (2), 28(12), 27, 29(1), 40(2) and 44(c) of the Constitution of the Republic of Uganda 1995.

*e) Human Rights Network for Journalists-Uganda V Attorney General*¹³

The Applicant filed a Constitutional petition in 2014, arguing that provisions of the Uganda Communications Act, 2013 are inconsistent with and contravene Article 29 (1) of the Constitution, which provides for freedom of expression, the declaration of principles of freedom of expression in Africa and basic standards of regulation of communication under international law in so far as they promote political interference by giving unfettered powers to the Minister of ICT to manage and make decisions for the Communications Commission, compromising its impartiality and independence.

*f) Edward Sekyewa V National Environment Management Authority , Edward Sekyewa V Makerere University*¹⁴,

Edward is a journalist and founder of the Hub for Investigative Media (HIM) which is at the fore of using the Access to Information law to request for information in the possession of government with a view of sharing it with the wider public to promote good governance and accountability. He has filed several requests, most of which have been rejected.

Recently in February 2015, he won a case he filed against the National Forestry Authority, denying him information regarding the procurement of the necessary equipment for prohibiting, control and management of fires in the 506 Central Forest Reserves in the country. In his application, he argued that the National Forestry Authority's refusal to grant his request violated the Access to Information Act of 2005 and Article 41 of the Constitution, which provide citizens a right of access to information in the possession of the State or any other organ or agency of the State.

The court found that the National Forestry Authority "acted in blatant disregard of the law" and ordered its Executive Director to grant Mr. Sekyewa "access to any and all records or information that he requested in accordance with the law".

¹³ Constitutional Petition No. 36 of 2014

¹⁴ Civil Suit No. 950/2014 and Civil Suit 949/2014